(5)

Supreme Court, U.S.
FILED
FEB 18 1997
CLERK

No. 96-262

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JON E. EDMOND, ET AL.,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Armed Forces

REPLY BRIEF OF PETITIONERS

LT. RICHARD R, BEYER
LT. COMDR. ALLEN LOTZ
U.S. Coast Guard
Commandant (G-L-5)
U.S. COAST GUARD
2100 2nd Street, S.W.
Washington, DC 20593
(202) 267-0115

ALAN B. MORRISON
(Counsel of Record)
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, N.W.
Washington, DC 20009
(202) 588-7720

Attorneys for Petitioners

19pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. The Secretary Lacks Statutory Authority to Appoint CCA Judges. 3

II. Military Appellate Judges Are Principal Officers. 9

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Page(s)

Buckley v. Valeo,
424 U.S. 1 (1976) 2

Freytag v. Commissioner,
501 U.S. 868 (1991) 11, 12

Morrison v. Olson,
487 U.S. 654 (1988) 1, 4, 9, 11

Myers v. United States,
272 U.S. 52 (1926) 4, 9

Rostker v. Goldberg,
453 U.S. 57 (1981) 2

United States v. Germaine,
99 U.S. 508 (1879) 8

United States v. Hartwell,
73 U.S. (6 How.) 385 (1868) 8

United States v. Senior,
36 M.J. 1016 (C.G.C.M.R. 1993) 6

Weiss v. United States,
114 S. Ct. 752 (1994) 7

STATUTES

Article 66 UCMJ, 10 U.S.C. § 866 . . . . . *passim*

49 U.S.C. § 102(e) 4

49 U.S.C. § 323(a) 5, 6

MISCELLANEOUS

Bill Peterson, *Is My Name on the List?*,
The Washington Post, January 2, 1981 at A1 5

Carl Brauer, *Lost in Transition: To a New President, Staffing a New Government Looks Easy Next to the Challenge of Getting Elected*, The Atlantic Monthly, November 1988 at 74 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-262

JON E. EDMOND, ET AL.,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Armed Forces

REPLY BRIEF OF PETITIONERS

Introduction

Before responding to the Government's specific arguments on the statutory interpretation and constitutional issues, there are two points in its brief that cut across both issues and that warrant a reply.

First, the Government contends that Congress decided that judges of the Courts of Criminal Appeals ("CCA") are inferior officers and that this Court should give deference to that determination. Br. 31. It is true that Congress did not require that CCA judges be appointed by the President, with the advice and consent of the Senate, but that will be true in every case in which the constitutional status of an officer is challenged. But here, unlike *Morrison v. Olson*, 487 U.S. 654 (1988), where two central issues in the legislative debates were the status of the office of independent counsel and how the Appointments Clause could be satisfied, there is not a shred of evidence that anyone in Congress ever gave

the issue a moment's consideration. This is true both in 1950, when the UCMJ was enacted, and in 1968 when Article 66 was amended to require the formal establishment of the Courts of Military Review ("CMR"), the predecessors of the CCAs. And it is equally true that, in 1966 when the Department of Transportation Act was passed, so far as can be determined, the issue of military appellate judges, let alone their constitutional status, was never discussed.

There is another reason why it is apparent that this issue was never considered by Congress in 1968 or before. Even prior to *Buckley v. Valeo*, 424 U.S. 1 (1976), which revitalized the Appointments Clause, it would have been obvious that the Judge Advocates General of the military services ("JAGs") could not appoint inferior officers. Accordingly, the only logical conclusion to be drawn, and one which is entirely consistent with all of the accessible legislative history, is that Congress never gave the Appointments Clause issue a thought, much less made a considered judgment that CCA judges are inferior officers. *Compare Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) ("customary deference accorded to congressional judgments . . . when Congress specifically considered the question of the Act's constitutionality"). We agree that, in close cases, a studied determination by Congress that an office is an inferior, rather than a principal one, might tip the balance, but we disagree that Congress made such a determination in this instance.

Second, respondent suggests that a ruling in petitioners' favor would create a major problem for the Government. Br. 32-33, 41-42. To be sure, Congress will have to amend the law to provide for a proper method of appointment for the civilian judges of the CCAs. If the Court agrees with our statutory argument, Congress will have to choose whether a Department Head or the President, either with or without the advice and consent of the Senate, should make the appointments, and whether there should be a specified term of office. It would also require Congress to consider

the relationship between the military and civilian judges and the relationship between CCA judges and the Judge Advocates General. In the interim, the four military CCA judges in the Coast Guard can handle the relatively modest number of yearly appeals (20), plus the cases that must be reconsidered on remand before a properly constituted panel. And if there are short-term administrative problems, they are traceable directly to the January 1993 decision to attempt to have the Secretary of Transportation reappoint the civilian judges, instead of seeking immediate relief from Congress or having the President make the appointment with the advice and consent of the Senate.

I. The Secretary Lacks Statutory Authority to Appoint CCA Judges.

The Government never actually states, in one place, how it believes that the statutory scheme here fits together, but as we understand it, this is how its system works. The Secretary of Transportation has the power to appoint civilian judges to the CCA, the General Counsel of the Transportation Department (who is the JAG for the Coast Guard) has the power to reassign civilian as well as military CCA judges to other positions (subject to the direction of the Secretary), the Secretary has the power to terminate the appointment of a civilian CCA judge, and the General Counsel continues to exercise all other powers under Article 66, including the power to select the Chief Judge of the Coast Guard CCA. The theory of this approach appears to be that Article 66 remains in effect to the maximum extent possible, consistent with the Appointments Clause, but that appointments for civilian judges are necessarily made under the DOT Act.

There are a number of problems with this approach which produces a scheme that is highly unusual if not unprecedented. At the very least, this fact should raise a question of whether Congress intended to create such an

arrangement, especially in the absence of clear language mandating it.

The most significant incongruity is that the Secretary appoints civilian judges, but the General Counsel removes them from their positions (although the Secretary may be the only one who can actually discharge them). The independent counsel statute also had different appointing and removing authorities, but both persons were eligible to appoint inferior officers under the Appointments Clause. Moreover, there was a strong policy reason why Congress bifurcated those responsibilities under the independent counsel statute: it wanted to keep the appointing power away from the Executive — to assure that the counsel would be truly independent — and it was concerned that the court which appointed the counsel not become enmeshed in the operations of an executive office, because that would create other problems under Article III. *See Morrison*, *supra*, 487 U.S. at 692-93, 695-96. Here, of course, no similar problems exist here since the President, if not the Secretary, could fulfill the appointment and removal functions with no constitutional or other problems.

The Government's response appears to be that this seeming anomaly does not matter because the Secretary can order his General Counsel to reassign a civilian judge and presumably fire the General Counsel for failure to carry out that order. Again, there are several flaws in this reasoning. It is quite doubtful that the Secretary can fire the General Counsel since that office is filled by the President, with the advice and consent of the Senate, not the Secretary. 49 U.S.C. § 102(e). While there can be no doubt that the President could fire the General Counsel, just as he can fire other high ranking officers whom he appoints, *Myers v. United States*, 272 U.S. 52 (1926), the Government cites no authority allowing the Secretary to do so here. Given the long history of disputes between Presidents and their Departments Heads over appointments of sub-cabinet

officers,[1] the casual assumption that the Secretary is entitled to fire his General Counsel at will is unfounded.

On the other hand, if the General Counsel can "reassign" civilian CCA judges by removing them from their positions, can he also place them in a new position, either with or without the Secretary's agreement? And what would that position be, given the limited number of Coast Guard billets for lawyers/judges? In effect, such a reassignment would likely become the functional equivalent of a dismissal, yet even the Government does not claim that the General Counsel may exercise that power over an appointee of the Secretary.

There may well be other incongruities involving this system in which there is divided authority over appointment and removal of civilian judges on the Coast Guard CCA. However, the larger point is that these oddities and the problems they create suggest very strongly that the Government is misreading the applicable statutes and is attempting to put a square peg in a round hole. Surely, given these anomalies, there is every reason *not* to stretch to construe the Secretary's residual appointment power to cover this situation.

The Government recognizes that 49 U.S.C. § 323(a) cannot be read literally to apply to *any* office in the Department because there are a number of instances where Congress has been specific as to the method of appointment and those specific provisions would control over the general

---

[1]*See* Carl Brauer, *Lost in Transition: To a New President, Staffing a New Government Looks Easy Next to the Challenge of Getting Elected*, The Atlantic Monthly, November 1988 at 74; Bill Peterson, *Is My Name on the List?*, The Washington Post, January 2, 1981 at A1, quoting incoming director of presidential personnel, E. Pendelton James, regarding sub-cabinet appointees: "These are presidential appointees, not secretarial ones. The final decision will be the president's. You've got to have a choke-hold - a control on who staffs government."

powers in § 323(a). We agree. Our difference is over whether Article 66, which deals directly with the subject of civilian CCA judges, provides a specific method of appointment for those positions.

Petitioners recognize that neither the word "appoint" nor any of its variations appears in Article 66. However, Article 66(a) has been construed since its enactment in 1950 to provide the statutory basis for the appointment of civilian judges to the appellate military tribunals of which the CCAs are the direct lineal descendants. This is apparent from the legislative history of the UCMJ, cited at page 23 of petitioners' opening brief, which demonstrates that this provision was added for the very purpose of permitting the appointment of civilian appellate judges, principally for the benefit of the Coast Guard. All of the Armed Services viewed this provision as allowing their Judge Advocate General to appoint both military and civilian judges to the CCAs and their predecessors, as evidenced by the blank certificate of appointment to the Navy-Marine Corps CMR, attached to petitioners' brief in *Weiss v. United States*, No. 92-1482, a copy of which is attached to this reply.

Moreover, the request to the Secretary to cure the Appointments Clause problem by the judges of the Coast Guard CMR in *United States v. Senior*, 36 M.J. 1016, 1018 (1993), quoted on page 9 of respondent's brief, uses the term "reappoint," which can only sensibly be read to mean that they had been previously "appointed" by someone, presumably the Coast Guard JAG, *i.e.*, the Transportation Department General Counsel and before 1966, his predecessor in the Coast Guard. Therefore, since respondent has pointed to no provision comparable to § 323(a) when the Coast Guard was part of Treasury, it is, in effect, arguing that, in creating the Department of Transportation in 1966, Congress intended to provide a new alternative means of appointing Coast Guard civilian appellate judges, without ever mentioning that change.

Further support for petitioners' interpretation comes from the Secretary's January 15, 1993 appointing memorandum (Appendix A6 to petitioners' brief), which covers all judges, military and civilian. Although less than clear, that memorandum reinforces petitioners' argument that Article 66(a) was construed as an appointing power since it refers to the prior "assignment of appellate military judges" as being "adopted this date as judicial *appointments* of my own." *Id.* (emphasis added). *But see* A7 (making no mention of appointments). Since *someone* had to appoint the civilians to the Coast Guard CMR (and to the Navy's as well when it used civilians), and since there is no doubt that the JAG of each service did the selection, there is no one else who could have been deemed the proper appointing authority under Article 66(a), except the JAG for each service. Accordingly, the Government's attempt to construe Article 66(a) as not providing any power to appoint civilian judges must be rejected based on this consistent pre-*Weiss* history of more than 40 years.

There is another serious flaw in the Government's response: it does not mention the remaining portions of Article 66, discussed at pages 15-16 of petitioners' brief. Those provisions create a system in which the JAGs are assigned the dominant roles vis-s-vis the CCAs, and the Department Heads have none. *See Weiss v. United States*, 114 S. Ct. 752, 762 (1994) (military appellate judges are "under the control of the Judge Advocates General"). Most prominent among the powers possessed by the JAGs is the right to select the Chief Judge, which has been negated by the Secretary's appointment of Chief Judge Baum, and presumably his successors so long as they are civilians. The Government does not attempt to resolve this dilemma, or that created by a potential competition between the General Counsel and the Secretary over whether a civilian or a military officer should fill a future vacancy in other positions on the CCA. Its only answer seems to be that "no useful purpose" would be served by petitioners' construction of

these statutes and by requiring Congress to consider the issue directly (Br. 42). To the contrary, insisting that Congress make its own judgment on this issue would assure that the system that is created makes sense in terms of the relationship between the various actors within the Department, that it is consistent with the similar relationship for the other Armed Services, and that the purposes of the Appointments Clause — to prevent the diffusion of power and to assure accountability — are maintained and not undermined, as the Government's construction of these statutes would do.

At the very least, this highly strained and unusual scheme suggests that Congress never intended this Rube Goldberg-like edifice that the Government has created. The solution is not technically difficult, but only Congress has the power to amend the operative statutes to create a workable and accountable system. The Secretary lacks the authority to fix the problems created by Article 66(a) for civilian judges of the Coast Guard CCA, and this Court should not countenance his attempt to do so.[2]

---

[2] *United States v. Hartwell*, 73 U.S. (6 How.) 385 (1868), is of no assistance to respondent. The Court there sustained an indictment of a clerk, appointed by the Assistant Treasurer of the United States at Boston, under a statute which applied to "[a]ll officers and other persons charged with the safe-keeping, transfer, and disbursement of the public money." The defendant argued that the law was limited to principal officers, but the Court rejected that defense and construed the statute broadly to apply to all subordinates. Nowhere is there any mention made of "inferior officers," let alone that the statute applied only to persons who met the definition of an "officer of the United States" in the Appointments Clause. By way of contrast, in *United States v. Germaine*, 99 U.S. 508 (1879), the criminal statute used that very phrase, and the Court found that the defendant was not an officer of the United States both because of his method of appointment

(continued...)

II. Military Appellate Judges Are Principal Officers.

As its principal mode of arguing that military appellate judges are inferior officers, the Government points to individual factors in other cases that have been cited by a Court for one result or another, and then argues that this case is like the other case, or not, depending on whether the similarity supports inferior officer status. There are two problems with this approach: it misuses the factors relied on, and it fails to examine the office of CCA judge as a whole, taking all of its attributes together to see whether it better fits the principal or inferior office category.[3]

For example, respondent points to the lack of a fixed term of office for military appellate judges, but the same is true for the Secretary and other cabinet and sub-cabinet officers, including the General Counsel, who can be fired at will by the President, *Myers*, *supra*, yet all of them are principal officers. The Government attempts to avoid this

---

[2](...continued)
and because his position was not permanent, which made him more like a contractor. *Germaine* correctly notes that the appointment of the clerk in *Hartwell* had been approved by his Department Head, but that fact was not the basis of the decision in *Hartwell*. In any event, approval of an appointment is not the equivalent of making an appointment (as the Senate can attest), and there is no evidence here that the Secretary ever approved any CMR appointments prior to January 15, 1993.

[3]We are at a loss to understand the relevance of the discussion on pages 17-19 of respondent's brief regarding the 1789 statutes providing for inferior offices in the original departments of government. Surely, respondent does not equate CCA judges with a "chief Clerk" whose only stated duty is during a vacancy to "have the charge and custody of all records, books and papers appertaining to the said department." Br. 18.

dilemma by stating the rule as applicable only to non-Presidential appointees (Br. 19), but never explains the source or basis of that limitation.

More fundamentally, as we read *Morrison*, "tenure" concerns the length of the existence of the office, not how long a given individual remains in that position. Thus, the independent counsel was an inferior officer, in part, because as soon as her assigned investigation and ensuing prosecutions were completed, the office itself terminated. 487 U.S. at 672. During its existence, there might be more than one occupant of the office, but it is the term of the office, not of the officer, that is relevant. Here, the office — military appellate judge for each of the Armed Forces — is permanent, although the person holding each of those positions changes from time to time, albeit quite infrequently in the case of civilian Coast Guard judges.

Similarly, the Government endeavors to make much of the extent of the supervision and related constraints on military appellate judges, but that too is overblown, or the term "supervision" is used in a way that makes no sense. For example, respondent argues that CCAs are limited in power because they cannot convict someone whom the court martial or convening authority has acquitted, but can only reverse a conviction or reduce a sentence. That statement is true, but it also applies to every criminal appeals court in the United States, including this Court, because the Double Jeopardy Clause mandates that limitation.

The Government also argues that the United States Court of Appeals for the Armed Forces and this Court have broader pow[illegible] than the CCAs, since they can reinstate what a CCA has set aside, as well as setting aside convictions on their own (Br. 25). Again that statement is true, but it conveniently overlooks the broader powers of the CCA to overturn factual findings and to reduce the sentence, neither

of which is available to the higher courts or to other appellate courts in the federal system in criminal appeals.[4]

Respondent's brief also suggests that the General Counsel/JAGs provide day-to-day supervision for CCA judges, but do not spell out how that occurs (Br. 22). Surely, "supervision" could not conceivably apply to writing opinions or other judicial matters, and there is no concrete evidence of any other specific manner in which the alleged supervision takes place. The only supervisory power that even the Government asserts for the General Counsel is to reassign a civilian judge, but once again the Government recognizes that decisions of that kind cannot be based on the way that a judge decides cases (Br. 23). And even assuming that the Secretary can fire a civilian judge, which the Government does not acknowledge, he has no other supervisory role in the process.

The proper analytical approach, we submit, and the one adopted in *Morrison*, is to focus on the office, not the officeholder, and decide where the office fits into the federal government's division between principal and inferior offices. Here, the position of judge on the Courts of Criminal Appeals is a principal office primarily because the CCAs have the obligation to review every conviction for a serious crime in the military. Their powers of review in criminal cases are more expansive than those of Article III appellate judges or those of judges in any other criminal justice system in the United States of which we are aware. And, as a practical matter, their word is the final word in almost every case, because there is no right to further review, but only

---

[4]Respondent also argues that CCA judges are inferior officers because their decisions are subject "to further review by the Court of Appeals for the Armed Forces." Br. 25. If further review is the determinative factor, then the latter court, whose members are appointed for 15 years terms by the President with the advice and consent of the Senate, is also an inferior one.

review by permission in the CAAF, which is rarely granted. Pet. Br. 29-30.

Finally, we are at a loss to understand the Government's response to our argument based on *Freytag v. Commissioner*, 501 U.S. 868 (1991). At one point, it seems to argue that those who appoint inferior officers need not themselves be principal officers, citing Justice Souter's concurrence in *Weiss* (Br. 29). But its brief never explains how that is consistent with the structure of the Appointments Clause, or why the Framers, who were very concerned with diffusion of power and lack of accountability, *Freytag*, 501 U.S. at 884-85, would allow untold numbers of inferior officers to appoint other inferior officers. And it would be inconsistent with the fact that, when Congress has delegated the power to appoint inferior officers, it has never, to our knowledge, allowed the appointing authority to be other than a principal officer. While *Freytag* did not decide the status of Tax Court Judges, the most sensible reading of the two opinions there is that they both assumed that Tax Court Judges are principal, not inferior, officers.

If that is the case, judges of the Courts of Criminal Appeals are at least as important in their scheme as Tax Court Judges are in theirs. Once again, there are factors that suggest that CCA judges might be inferior officers, but on the key issue of finality — whether it is likely that anyone will actually alter their decisions — Tax Court Judges are more "inferior" since all of their rulings are appealable as of right to their "superiors" in the Circuit Courts of Appeals. But for the Courts of Criminal Appeals, the "superior" is the Court of Appeals for the Armed Forces, to which there is no appeal of right and which hears a very small percentage of the cases decided by the CCAs.

In our view, for judicial offices, the factor of practical finality is the most significant one because the normal rules of supervision and daily accountability have no meaning between levels of judicial decisionmakers. The focus on practical finality is most responsive to the difference between

a "principal" and an "inferior" judicial office, at least where the office is a permanent institution. This focus on finality explains why administrative law judges, special tax court judges, magistrate judges, and other similar judicial-type officers are inferior officers since all of their decisions are subject to at least one level of review, in either an agency or a court, as a matter of right. The issue is not what the standard of review is, but whether the tribunal's decisions are always reviewable by a higher body that makes it an inferior, not principal office. Seen in this light, there can be no doubt that, like the Tax Court Judges in *Freytag*, the judges of the Courts of Criminal Appeals are principal not inferior officers, and as such, they must be appointed by the President, with the advice and consent of the Senate. At the very least, this substantial constitutional question presents a further reason to resolve the statutory issue in petitioners' favor.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, and these cases should be remanded so that a properly constituted panel of the Coast Guard Court of Criminal Appeals can hear the appeals of these six petitioners.

Respectfully submitted,

LT. RICHARD R, BEYER
LT. COMDR. ALLEN LOTZ
U.S. Coast Guard
Commandant (G-L-5)
U.S. COAST GUARD
2100 2nd Street, S.W.
Washington, DC 20593
(202) 267-0115

ALAN B. MORRISON
(Counsel of Record)
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, N.W.
Washington, DC 20009
(202) 588-7720

Attorneys for Petitioners

February 1997

United States Navy—Marine Corps
Court of Military Review

The Judge Advocate General

To all who shall see these presents
Greetings:

Know ye that reposing special trust in the Wisdom, Uprightness and Learning of

and by virtue of the power vested in me by an Act of the United States Congress, I do appoint him

Appellate Military Judge
United States Navy — Marine Corps Court of Military Review

and do authorize and empower him to execute and fulfill the duties of that office according to the Constitution of the United States and the Uniform Code of Military Justice, and to have and to hold the said office, with all the powers, privileges and emoluments to the same appertaining to him.

In witness whereof, I have hereunto subscribed my name and affixed my seal of office at Washington, D.C., this _____ in the year of our Lord one thousand nine hundred and _____

Rear Admiral, JAGC, U. S. Navy
The Judge Advocate General